(GP6605)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 995

SIMON METRIK,

Petitioner,

—against—

FORT TRYON GARDENS, INC.,

Respondent.

PETITION AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI AND OTHER RELIEF

JACOB W. FRIEDMAN,
Attorney for Petitioner.

RECORD PRESS—NYC—REctor 2-2638

INDEX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 995

SIMON METRIK,

Petitioner,

—against—

FORT TRYON GARDENS, INC.,

Respondent.

PETITION FOR REHEARING AND OTHER RELIEF

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Simon Metrik, respectfully prays this Court to reconsider its determination made on April 2, 1945, which denied his petition for a writ of certiorari to the Appellate Term, First Department, of the Supreme Court of the State of New York. That determination affirmed an order of the Municipal Court of the State of New York, denying petitioner's motion to vacate a final order in a summary proceeding, which final order awarded the respondent possession of certain apartment premises in the City of New York (R. 57-59). The time for filing the present petition for rehearing has been extended by Mr. Justice Jackson to and including May 24, 1945.

The Court is referred to the original petition and brief filed herein in February, 1945, the contents whereof are reiterated and incorporated herein.

Petitioner has been deprived of the possession of the aforesaid premises by a summary proceeding under New York Civil Practice Act, Sections 1419 and 1421, pursuant to which the respondent as landlord obtained a final order and succeeded in evicting petitioner upon two hours' notice (and this notice only a constructive notice, without personal service on petitioner). All of the petitioner's efforts to obtain a trial on the merits have not availed, and it is his contention that those statutes do not provide sufficient notice and therefore sanction a violation of due process of law, is disregard of the Fourteenth Amendment, Section 1, of the Constitution of the United States.

In opposition to the arguments advanced by petitioner, respondent adduced several untenable considerations, as will be concisely shown in the subjoined brief.

Respondent also required petitioner to print an unusually long record, entirely unnecessary for a determination of the question presented, and in violation of the rules of this Court.

The question of whether a dispossess proceeding may be commenced and terminated all within two hours, notwithstanding the constitutional requirement mentioned, is an important one and likely to arise quite frequently. It is desirable that it should be clarified by a plenary review, to the end that the validity or invalidity of the statutes be settled or better understood, and, more specifically, that this petitioner should not be unjustly ousted.

Your petitioner therefore respectfully submits that a rehearing should be granted herein; that the determination of this Court denying the writ of certiorari be set aside; that such writ be granted to review the aforesaid determination; and that petitioner have other appropriate relief.

Dated: New York, New York, May 24, 1945.

SIMON METRIK

By JACOB W. FRIEDMAN,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 995

SIMON METRIK,

Petitioner,

—against—

FORT TRYON GARDENS, INC.,

Respondent.

BRIEF ON APPLICATION FOR REHEARING

In opposition to the substantial reasons heretofore urged for the allowance of the writ, respondent raised a number of points, none of which are meritorious. They will be concisely considered in the order in which they were presented.

I

Respondent argued that no Federal question was presented but assigned no reason for this assertion.

Respondent declared further that petitioner had not exhausted all remedies in the state courts, contending that on a prior intermediate appeal to the Appellate Term the petitioner had not attempted to obtain a review by the Appellate Division. The reason why this procedure was followed was that petitioner hoped upon the hearing of the traverse, to have the service declared invalid. In fact, he did not seek recourse in the Supreme Court of the United

States until all avenues of additional review in the state courts were closed. He attempted to obtain an orderly determination in an orderly way. When his first appeal to the Appellate Term resulted in a reversal, it would have been absurd for him to seek a further review at that intermediate stage, for the Appellate Division would have undoubtedly required that he proceed with the traverse before looking for different relief. It was only when he was finally denied his day in court and after the Appellate Division refused on his motion to entertain an appeal from the last determination of the Appellate Term that he filed his petition for certiorari. Respondent has little to say about the last application to the Appellate Division but stresses the earlier and intermediate determination of the Appellate Term so as to make it appear that petitioner did not exhaust his state remedy. The authorities cited by respondent deal clearly with situations wherein petitioner sought to hurdle state appeal courts. That is plainly not the case here, for petitioner proceeded absolutely as far as the state laws permit.

By the same token, it cannot be said that petitioner waived any rights by accepting the alleged benefits of the first appeal. He merely was acting with the consistent hope of obtaining a day in court, and at every single stage of the proceeding he urged the unconstitutionality of the statutes involved. Certainly, a trial of the issue of whether the precept was served in more or less than two hours may not be held a day in court. The argument of respondent's that petitioner had a full and complete hearing is contrary to the facts.

II

Respondent argues that the question presented is moot, for the reason that respondent has until now succeeded in

evicting petitioner from the premises, and his alleged renewal tenancy would have expired on September 14, 1944. This argument is unsound, for no illegal act can be validated by the speed with which it is consummated or the lapse of time necessitated for relief in the courts, especially when petitioner's efforts to undo the wrong were instituted on the very day of the commencement of the proceeding and have continued uninterruptedly since that day.

Respondent also, surprisingly enough, has invoked the Emergency Price Control Act of 1942 and the regulations issued by the Office of the Price Administrator, to show that "it is impossible to remove the tenant" (referring to the new tenant who was given possession by respondent in place of petitioner). That very statute would have rendered it equally impossible for respondent to remove petitioner if this Court should ultimately hold that he was deprived of his possession without due process of law and was therefore entitled to be restored to possession. In short, the lapse of time has not made it impossible for this Court to grant petitioner effectual relief.

III

With all of respondent's argument and authorities, it has not cited a single case wherein this Court has held valid a statute permitting an action or proceeding to be commenced and terminated within two hours or in comparable time. The closest approach is apparently the decision in *Kennard* v. *Louisiana*, 92 U. S. 480, 23 L. Ed. 478, upholding a statute making certain process returnable in 24 hours. If that feature alone should not be sufficient to distinguish the case, a reading of the opinion discloses that the party affected duly answered and was given a trial on the merits, the outcome of which was in turn duly reviewed on appeal. Therefore, the individual claim to be aggrieved not only had the

right to be heard but was in fact heard both on trial and on appeal, and these circumstances expressly were made the *ratio decidendi* of the Supreme Court of the United States.

Respondent adduced nothing to detract from the force of the authority of *Roller* v. *Holley*, 176 U. S. 398, 44 L. Ed. 520.

IV

Irrespective of the disposition of the present application, we desire to call the court's attention to the fact that, as indicated in our original petition and brief (pp. 3-4), about one-half of the transcript of record (R. 17-57) consists of testimony on the hearing as to the time of service, none of which is germane to the question of law presented herein, but was included on the insistence of respondent, which declined to stipulate as to any curtailment of the record. It is provided in Rule 13, Subd. 9, of the Rules of this Court:

> "If either party shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper."

Under the circumstances, we submit that respondent should be required to pay costs accordingly.

It must be shocking to lawyers and litigants alike to learn that in the State of New York there is a statute on the books whereby a person can be deprived of the possession of real property through the medium of a proceeding that is begun and ended all within two hours—and that a proceeding wherein personal service is not required but the process may be left at his home. Were this Court to hold that this is

a compliance with the requirements of due process, unfortunate and oppressive results might follow. The question presented is surely one that is deserving of the fullest consideration.

CONCLUSION

Petitioner respectfully urges, for all of the foregoing reasons, as well as those presented in his original papers, that this Court rescind its determination made on April 2, 1945, denying his petition for a writ of certiorari and that it grant such writ to the Appellate Term, First Department, of the Supreme Court of the State of New York, to review its determination, and that it make such order as to costs as may be just.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner.